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FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6164 (Mike Sodrel, *et al.*)

DATE COMPLAINT FILED: January 28, 2009

DATE OF NOTIFICATION: February 3, 2009

LAST RESPONSE RECEIVED: March 30, 2009

DATE ACTIVATED: May 4, 2009

EXPIRATION OF SOL: 1/1/2009 to 11/4/2011

COMPLAINANT:

Brian L. Wolff, on behalf of the Democratic
Congressional Campaign Committee

RESPONDENTS:

Mike Sodrel
Friends of Mike Sodrel, and Gregory M. Fitzloff,
in his official capacity as treasurer
Citizens for Truth
Economic Freedom Fund

RELEVANT STATUTES AND REGULATIONS: 2 U.S.C. § 431(18)

2 U.S.C. § 431(22)

2 U.S.C. § 433

2 U.S.C. § 434

2 U.S.C. § 434(c)(1)

2 U.S.C. § 441a

2 U.S.C. § 441a(a)

11 C.F.R. § 100.22(a)

11 C.F.R. § 100.22(b)

11 C.F.R. § 109.21

11 C.F.R. § 114.15(a)

INTERNAL REPORTS CHECKED:

Federal Disclosure Reports

FEDERAL AGENCIES CHECKED:

Internal Revenue Service

I. INTRODUCTION

The Democratic Congressional Campaign Committee, through its Executive Director, Brian L. Wolff, alleges that Mike Sodrel ("Sodrel"), the Friends of Mike Sodrel, Sodrel's principal campaign committee for his 2004 and 2006 congressional campaigns in Indiana's 9th Congressional District, and Gregory M. Fitzloff, in his official capacity as treasurer ("FMS"), coordinated communications with Citizens for Truth ("CFT") as well as the Economic Freedom Fund ("EFF") (hereinafter, collectively the "Respondents"). The allegedly coordinated communications involved radio ads, billboards, and robocalls advocating for the defeat of Baron Hill, Mike Sodrel's opponent in the 2004 and 2006 general elections. In support of the allegations, the complaint included phone records purportedly showing calls between individuals associated with FMS, CFT, and EFF. *See* Complaint at Attachment A. The complaint alleges that CFT thereby knowingly made, and Sodrel knowingly accepted, excessive contributions in violation of 2 U.S.C. § 441a. *See* Complaint at 4-5.

Additionally, the Complaint alleged that FMS and CFT failed to disclose the contributions and expenditures associated with the allegedly coordinated communications in violation of 2 U.S.C. § 434. *See* Complaint at 5-6. The complaint also alleges that CFT made more than \$1,000 in expenditures but did not register with the Commission as a political committee, thereby violating 2 U.S.C. § 433. *See* Complaint at 5. Finally, the complaint alleges CFT violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to file independent expenditure or electioneering communication reports with the Commission regarding its election activity in 2004 and 2006. *See* Complaint at 6.

1 A prior matter, MUR 5845 (Citizens for Truth), was generated by a complaint
2 filed by the Indiana Democratic Party that alleged that FMS and CFT coordinated their
3 communications during the 2004 election cycle. In that matter, the Commission found no
4 reason to believe and closed the file because there was insufficient information available
5 to support the allegations, including the fact that the complaint identified no
6 communications. See MUR 5845 (Citizens for Truth) Factual and Legal Analysis at 8.
7 In contrast to MUR 5845, the MUR 6164 complaint alleges activity in both the 2004 and
8 2006 election cycles.

9 Based on the information provided in the complaint and the responses to the
10 complaint, and for the same reasons present in MUR 5845, that is, a lack of information
11 that would satisfy the coordinated communications test at 11 C.F.R. § 109.21, we
12 recommend that the Commission find no reason to believe that Respondents violated
13 2 U.S.C. § 441a through the making of excessive contributions by Citizens for Truth and
14 the Economic Freedom Fund to the Friends of Mike Sodrel. Because the available
15 information does not indicate that Respondents may have coordinated communications,
16 we also recommend that the Commission find no reason to believe that Citizens for
17 Truth, Mike Sodrel, or the Friends of Mike Sodrel failed to disclose the allegedly
18 coordinated communications as contributions and expenditures in violation of 2 U.S.C.
19 § 434. Additionally, we recommend that the Commission find no reason to believe that
20 Citizens for Truth violated 2 U.S.C. § 433 for failing to register with the Commission as a
21 political committee. Finally, given that the only identifiable communication in this
22 matter is a radio ad that was broadcast in October 2004 and the modest potential amount
23 that CFT spent on this ad, we recommend that the Commission dismiss the allegations

1 that Citizens for Truth violated 2 U.S.C. § 434(c) by failing to file independent
2 expenditure reports with the Commission and find no reason to believe that Citizens for
3 Truth violated 2 U.S.C. § 434(f) by failing to file electioneering communication reports
4 with the Commission.

5 **II. FACTUAL AND LEGAL ANALYSIS**

6 **A. Factual Background**

7 Mike Sodrel and Baron Hill have repeatedly challenged one another in elections
8 for the seat in the House of Representatives representing Indiana's Ninth Congressional
9 District. Complaint at 2. Hill first won election in 1998, successfully defended a
10 challenge from Sodrel in 2002, lost to Sodrel in 2004, regained the seat in 2006, and,
11 most recently, defeated Sodrel's challenge in 2008. *Id.*

12 CFT is a section 527 organization founded in 2004 by Bud Bernitt, who serves as
13 its President.¹ *Id.* The complaint alleges, on "information and belief," that Bernitt "more
14 or less" exclusively controls CFT and uses it to attack Rep. Hill. *Id.* According to the
15 Complaint, all of CFT's activities have been attacks on Rep. Hill. *Id.* Citing CFT's own
16 statements on the CFT website, the complaint alleges that in 2004 CFT "released
17 hundreds of ads attacking Hill, and sponsored 38 billboards" and in 2006 aired radio
18 advertisements and sponsored billboards attacking Hill in 2006. *Id.* The complaint does
19 not include a transcript of any of the alleged radio ads but instead refers to a "sample ad"
20 on the CFT website. *Id.* The CFT website includes an audio recording and transcript for
21 one radio ad called "Baron the Dodger" that, according to a CFT press release, was
22 broadcast in October 2004. See www.citizensfortruth.com/whereisbaron/PR-radio-

¹ Section 527 organizations refer to organizations that file with the Internal Revenue Service under Section 527 of the Internal Revenue Code.

1 dodger.htm. The complaint alleges that, "on information and belief," CFT spent "more
2 than \$10,000" on radio ads "attacking Hill" in 2004 and 2006. There are no descriptions
3 of the billboards in the complaint. *Id.* The CFT website also has no information about
4 billboards.

5 On its website, CFT describes itself as follows:

6 Citizens for Truth (CFT) is committed to promoting Hoosier family values
7 and educating Hoosiers on issues relating to those values. CFT is a "527"
8 political group dedicated to informing the people of Indiana on the voting
9 records, issue positions, actions and public statements of elected officials
10 and candidates for public office.

11
12 <http://www.citizensfortruth.com/aboutus/>.

13
14 **III. ANALYSIS**

15 **A. Alleged Coordination Between Citizens for Truth and Sodrel or**
16 **Friends of Mike Sodrel**

17
18 The complaint asserts that CFT coordinated its communications, radio ads and
19 billboards, with Sodrel or FMS in 2004 and 2006. The Act provides that expenditures by
20 any person "in cooperation, consultation, or concert, with, or at the request or suggestion
21 of, a candidate, his authorized political committees or their agents" constitute in-kind
22 contributions to the candidate's authorized committee. 2 U.S.C. § 441a(a)(7)(B)(i). A
23 payment for a coordinated communication must be reported as an expenditure made by
24 that candidate's authorized committee. 11 C.F.R. § 109.21(b)(1). In addition, as an in-
25 kind contribution, the costs of a coordinated communication must not exceed a political
26 committee's applicable contribution limits. See 2 U.S.C. § 441a.

27 To determine whether a communication is coordinated, 11 C.F.R. § 109.21 sets
28 forth a three-pronged test: (1) the communication must be paid for by a person other than
29 a federal candidate, a candidate's authorized committee, or any agent of either of the

foregoing; (2) one or more of the four content standards set forth in 11 C.F.R. § 109.21(c) must be satisfied; and (3) one or more of the six conduct standards set forth in 11 C.F.R. § 109.21(d) must be satisfied. *See* 11 C.F.R. § 109.21(a).

1. Billboards

The complaint asserts that CFT coordinated its payment for billboards with Sodrel or FMS in 2004 and 2006. However, the complaint contained no descriptions of the allegedly coordinated billboards but rather merely noted that CFT referred to billboards on its website. *See* Complaint at 2. We located a press release on the CFT website dated March 27, 2006 that states "Citizens for Truth ran radio advertisements, erected billboards and posted www.WhereIsBaron.com during the 2004 election cycle to educate people about Baron Hill's positions on key issues of concern to Hoosiers." *See* www.citizensfortruth.com/pressreleases/pr032706.shtml. A press release dated October 23, 2004, on the CFT website states that WhereIsBaron.com "released 38 new billboards and a website to help Hoosier voters learn more about the elusive Congressman's liberal voting record" and that the "issues-based WhereIsBaron.com billboard campaign begins today in counties throughout Southern Indiana." *See* www.citizensfortruth.com/whereisbaron/PR-38-billboards.htm. CFT acknowledged making a "small billboard buy" in 2004, *see* CFT Response at 2-4, and in its 2004 filings with the Internal Revenue Service, CFT disclosed spending \$6780 on October 21, 2004 for "Billboard Sales." *See* CFT IRS Form 8872 (dated December 1, 2004).

Billboards are public communications. *See* 2 U.S.C. § 431(22). Because CFT's October 2004 billboards concerned Rep. Hill's voting record, they presumably identified Rep. Hill. Even assuming, *arguendo*, that the billboards were public communications

1 that clearly identified a federal candidate in the candidate's jurisdiction, and otherwise
2 satisfied at least one of the content standards in 11 C.F.R. § 109.21(c), the coordinating
3 conduct alleged in the complaint took place in 2006 and there is no information about
4 alleged coordinating conduct in 2004. CFT also reported to the Internal Revenue Service
5 that it paid a media consultant \$5,915 on October 10, 2006, and \$2,630 on October 17,
6 2006, for "billboards." See CFT IRS Form 8872 (dated December 5, 2006). However,
7 there is no available information concerning the content of CFT's 2006 billboards.

8 Based on the available information, the allegations with respect to CFT's 2004
9 and 2006 billboard buys are not sufficient to warrant an investigation into whether the
10 conduct and content standards, see 11 C.F.R. § 109.21(c) and (d), of the coordinated
11 communications test have been met.

12 2. *Radio Ads*
13

14 The complaint included no radio ad transcripts or dates of their broadcast. It
15 referred only to a "sample ad" on the CFT website. See Complaint at 2-4. A press
16 release on the CFT website dated October 27, 2004, states that CFT's WhereIsBaron.com
17 released "hundreds of new 60 second radio ads throughout southern Indiana to help
18 Hoosier voters learn more about the elusive Congressman's liberal voting record." See
19 www.citizensfortruth.com/whereisbaron/PR-radio-dodger.htm. A press release dated
20 October 29, 2004, on the CFT website refers to CFT "issue ads" that were being aired on
21 "over a dozen" radio stations. See [www.citizensfortruth.com/whereisbaron/PR-radio-](http://www.citizensfortruth.com/whereisbaron/PR-radio-intimidator.htm)
22 [intimidator.htm](http://www.citizensfortruth.com/whereisbaron/PR-radio-intimidator.htm). The press releases included a link to listen to an ad called "Baron the
23 Dodger" and the October 27, 2004, press release included a transcript of the ad. The
24 transcript of the ad is as follows:

1 Why has Baron Hill dodged all but one debate? Maybe it's because he
2 doesn't want you to know that he voted twice against protecting the
3 American flag from people who want to burn it. Or could it be that Baron
4 wants to keep it a secret that he voted to give preferential trade status to
5 Communist China. Maybe Baron is worried that you'll find out that he
6 voted against ending the burdensome death tax that devastates so many
7 families after the death of a loved one. It might surprise you to learn that
8 Baron voted against protecting traditional marriage from activist liberal
9 judges. In fact, Baron voted no to military border patrols that would have
10 protected us from drugs and terrorism. Did you know that Baron even
11 voted against keeping God in the Pledge of Allegiance. No wonder Baron
12 doesn't want to debate the issues. He's afraid we'll find out how liberal
13 he really is. To learn more about Baron Hill's sneaky liberal agenda, visit
14 WhereisBaron.com. Paid for and approved by Citizens for Truth. Not
15 affiliated with any candidate or political party.

16
17 See www.citizensfortruth.com/whereisbaron/PR-radio-dodger.htm.

18 The "Baron the Dodger" radio ad is the only radio ad on the CFT website. The
19 complaint included no further information, and none was found on the CFT website,
20 regarding other CFT radio ads in 2004 or any radio ads in the 2006 election. It its
21 response, CFT denies any spending on radio ads in the 2006 election cycle. See CFT
22 Response at 2-4. Thus, the only CFT communication which can be analyzed under the
23 coordinated communications test is the 2004 Baron the Dodger ad.

24 a. Payment Prong

25 As to the first prong of the coordination test, the complaint asserts that CFT paid
26 for radio ads and billboards and CFT acknowledges in its response that it spent "less than
27 \$10,000" in the 2004 election cycle on both radio ads and a "small billboard buy." See
28 Complaint at 2; CFT Response at 2-4. As noted above, the Baron the Dodger ad is a CFT
29 radio ad that was broadcast in October 2004. Thus, it appears that CFT may have paid
30 for a communication in 2004, satisfying the first prong of the coordination test. See
31 11 C.F.R. § 109.21(a)(1).

b. Content Prong

At all times relevant to this matter, the second or "content" prong of the coordination test was satisfied if the communications at issue met at least one of four content standards: (1) a communication that was an electioneering communication as defined in 11 C.F.R. § 100.29; (2) a public communication that republished, disseminated, or distributed candidate campaign materials; (3) a public communication containing express advocacy; or (4) a public communication, in relevant part, that referred to a clearly identified Federal candidate, publicly distributed or disseminated 120 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified candidate. See 11 C.F.R. § 109.21(c).²

The "Baron the Dodger" radio ad satisfied the last of these standards.

The Baron the Dodger radio ad was a public communication, see 2 U.S.C. § 431(22), referring to Baron Hill, a clearly identified federal candidate, see 2 U.S.C. § 431(18), publicly distributed or disseminated in October 2004, which was 120 days or

² In response to the decision in *Shays v. F.E.C.*, 414 F.3d 76 (D.C. Cir. 2005) ("*Shays I*"), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. See *Final Rules and Explanation & Justification, Coordinated Communications*, 71 Fed. Reg. 33190 (June 8, 2006). The amended regulations, among other things, reduced the pre-election window during which certain communications that refer to a clearly identified House or Senate candidate are publicly distributed or otherwise publicly disseminated from 120 to 90 days. See 11 C.F.R. § 109.21(c)(4)(i) (2007). Subsequently, in *Shays III*, the U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. See *Shays v. F.E.C.*, 508 F. Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). Subsequently, the D.C. Circuit affirmed the district court regarding the invalidity of the current standard for public communications made outside the timeframes specified in the standard. See *Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008).

The activity at issue in this matter occurred before the July 10, 2006 effective date of the revisions to Section 109.21. Accordingly, all citations to the Commission's regulations refer to them as they existed prior to that date. Notably, the revisions would not appear to change the result in this matter even if they were applied retroactively. CFT's "Baron the Dodger" radio ad was broadcast in October 2004 which was within the shortened 90-day time frame in the revised regulations (based on the November 2, 2004 general election, the 90-day period would start on August 4 and the 120-day period would start on July 5).

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fewer before a general election, and it was directed to voters in the jurisdiction of the clearly identified candidate.³ Accordingly, the ad satisfies the content prong of the coordinated communications test. *See* 11 C.F.R. § 109.21(c).

c. Conduct Prong

The Commission's regulations set forth six types of conduct between the payor and the recipient committee, whether or not there is agreement or formal collaboration, that can satisfy the conduct prong. *See* 11 C.F.R. § 109.21(d). To meet the conduct prong of the coordination communication test, the communication must have been made at the request or suggestion of the Federal candidate, with some material involvement by the Federal candidate, as a result of substantial discussions with the Federal candidate, or through the use of a common vendor, employee or independent contractor that the Federal candidate also used within certain timeframes. 11 C.F.R. § 109.21(d).

The complaint asserts that there is "overwhelming" evidence of coordination between CFT and Sodrel. *See* Complaint at 4. In support of this contention the complaint offers only two suppositions: that CFT was formed only to attack Hill which, the complaint asserted, is "rare" or "unprecedented" for a 527 organization; and that Bernitt made 71 "contacts" with Sodrel or his associates in the 67 days leading up to the 2006 election. *See* Complaint at 4 and Attachment A.

The first contention does not satisfy the conduct standard in the Commission's coordination regulations. Even if CFT was formed only to attack Rep. Hill, this fact

³ The Baron the Dodger radio may also be an electioneering communication because it is a broadcast communication that refers to a clearly identified candidate for Federal office and was publicly distributed in October 2004, that is, within 60 days before a general election for the office sought by the candidate. *See* 11 C.F.R. § 100.29. However, it is unclear whether it was "targeted to the relevant electorate," that is, whether it could have been received by 50,000 people in the relevant Congressional district. *See* 11 C.F.R. § 100.29(b)(5)(i).

1 alone does not indicate that CFT was not acting independently but rather coordinating its
2 attacks on Hill with FMS, and therefore that CFT's payments for its communications
3 constituted excessive in-kind contributions to FMS.

4 The second contention is limited to alleged contacts shortly before the 2006
5 election, and, therefore, the available information does not suggest that the conduct
6 standard may have been satisfied with respect to the broadcast of CFT's "Baron the
7 Dodger" radio ad before the 2004 election.

8 Accordingly, as the available information does not indicate that the conduct
9 standard of the coordinated communications may have been met, we recommend that the
10 Commission find no reason to believe that Citizens for Truth made, and Mike Sodrel or
11 the Friends of Mike Sodrel and Gregory M. Fitzloff, in his official capacity as treasurer,
12 accepted excessive in-kind contributions in violation of 2 U.S.C. § 441a. Consequently,
13 we also recommend that the Commission find no reason to believe that the Friends of
14 Mike Sodrel and Gregory M. Fitzloff, in his official capacity as treasurer, failed to report
15 the allegedly coordinated communications as contributions in violation of 2 U.S.C. § 434.

16 **B. Alleged Coordination with the Economic Freedom Foundation**

17 The complaint alleges that EFF is a section 527 organization that sponsored
18 "communications, including automated phone calls . . . that attacked Hill." See
19 Complaint at 3. The complaint further alleges that Bud Bernitt, the founder and president
20 of CFT, "called EFF during the 2006 campaign, when both Bernitt and EFF were
21 mounting a negative campaign against Hill" and that this fact "suggests that Bernitt,
22 acting on behalf of the Sodrel campaign, may have shared material information with
23 EFF." See Complaint at 5. The complaint, however, includes no information about the

1 alleged EFF automated phone calls and no information indicating that Bernitt had
2 material information from the Sodrel campaign that he shared with EFF.⁴

3 EFF states in its response that the complaint is premised on a phone record
4 indicating a single phone call between Bernitt and "an unmonitored telephone number
5 assigned to EFF" that was listed on the EFF website. EFF Response at 1. EFF states that
6 "Neither EFF nor any of its former agents knows a Herman Bernitt" and "[n]either EFF
7 nor any of its former agents 'shared' any information with a Herman Bernitt." *Id.* EFF
8 also noted that it had ceased making any automated calls "of public interest to the citizens
9 of Indiana" six days before the alleged call from Bernitt to EFF. *Id.* CFT's founder and
10 president, Bud Bernitt, also denied the allegation, stating "neither I . . . nor anyone
11 connected with CFT, coordinated in any way with EFF or the Sodrel campaign" and, to
12 the best of his knowledge, EFF had stopped any activity in the Ninth District months
13 before my two minute call to their voicemail." CFT Response at 4.

14 Based upon the speculative nature of the allegations as to the coordination
15 between the Economic Freedom Fund and Sodrel or the Friends of Mike Sodrel, we
16 recommend that the Commission find no reason to believe that the Economic Freedom
17 Fund made, and Mike Sodrel or the Friends of Mike Sodrel and Gregory M. Fitzloff, in
18 his official capacity as treasurer, accepted excessive in-kind contributions in violation of
19 2 U.S.C. § 441a. See MUR 4960 (Hillary Rodham Clinton for U.S. Senate) Statement of
20 Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and

⁴ Even assuming that the automated calls referenced in the complaint in MUR 6164 are the same as the calls addressed in MUR 5842 (Economic Freedom Fund), we note that the Commission did not reach a majority decision in MUR 5842 as to whether the EFF phone calls expressly advocated the election or defeat of clearly identified candidates and closed the file. See MUR 5842 Statement of Reasons of Commissioners Peterson and Hunter and Statement of Reasons of Commissioners Bauerly and Weintraub.

1 Scott E. Thomas (purely speculative allegations accompanied by a direct refutation do
2 not form an adequate basis to find reason to believe that a violation of the Act occurred).

3 C. CFT's Alleged Failure to Register with the Commission and Disclose
4 Contributions and Expenditures Based Upon Coordinated
5 Communications
6

7 The complaint alleges that if CFT coordinated communications with Sodrel, it
8 would have made more than \$1,000 in expenditures and would have been required to
9 register with the Commission pursuant to 2 U.S.C. § 433. The complaint also alleges that
10 FMS and CFT failed to disclose the contributions and expenditures associated with the
11 allegedly coordinated communications in violation of 2 U.S.C. § 434. See Complaint at
12 5. As indicated above, the available information does not indicate that there may have
13 been coordination between CFT and Sodrel or FMS. Accordingly, we recommend that
14 the Commission find no reason to believe that Citizens for Truth violated 2 U.S.C. § 433,
15 and find no reason to believe that the Friends of Mike Sodrel and Gregory M. Fitzloff, in
16 his official capacity as treasurer, or Citizens for Truth violated of 2 U.S.C. § 434 based on
17 the allegedly coordinated communications.

18 D. CFT's Alleged Failure to File Independent Expenditure or
19 Electioneering Communication Reports
20

21 Finally, the complaint alleges that CFT violated the Act by failing to file
22 independent expenditure or electioneering communication reports with the Commission
23 regarding its election activity in 2004 and 2006 because CFT's ads in 2004 and 2006
24 constitute express advocacy under the Act and should have been reported as independent
25 expenditures or electioneering communications. See Complaint at 6. If CFT's payments
26 for its election activity constituted "independent expenditures" within the meaning of the
27 Act and were over \$250 in any given year, then CFT would have been required to file a

1 statement containing certain disclosures with the Commission. See 2 U.S.C. 434(c)(1)
2 and 11 C.F.R. § 109.10. See 60 Fed. Reg. 35292, 35295 (July 6, 1995). Also, every
3 person who makes a disbursement for the direct costs of producing and airing
4 electioneering communications in an aggregate amount in excess of \$10,000 during any
5 calendar year must file a statement with the Commission containing certain information,
6 including the names and addresses of all contributors who contributed an aggregate
7 amount of \$1,000 or more to the person making the disbursement. See 2 U.S.C. § 434(f).
8 An electioneering communication includes broadcast communications that refers to a
9 clearly identified candidate for federal office that is made within 60 days before a general
10 election and which is targeted to the relevant electorate. See 2 U.S.C. § 434(f)(3). A
11 communication is targeted to the relevant electorate if the communication can be received
12 by 50,000 or more persons in the district the candidate seeks to represent, in the case of a
13 candidate for Representative. See 2 U.S.C. § 434(f)(3)(C).

14 *1. Independent Expenditures*

15 In determining whether an organization makes an expenditure, the Commission
16 "analyzes whether expenditures for any of an organization's communications made
17 independently of a candidate constitute express advocacy either under 11 C.F.R.
18 § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." 72 Fed. Reg. at 5606.
19 Under the Commission's regulations, a communication contains express advocacy when
20 it uses phrases, campaign slogans, or individual words "which in context can have no
21 other reasonable meaning than to encourage the election or defeat of one or more clearly
22 identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say
23 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'" 11 C.F.R. § 100.22(a);

1 *see also Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (the fact that a
2 message is "marginally less direct than 'Vote for Smith' does not change its essential
3 nature").

4 Under the Commission's regulations, express advocacy may also consist of a
5 communication that contains an "electoral portion" that is "unmistakable, unambiguous,
6 and suggestive of only one meaning" and about which "reasonable minds could not differ
7 as to whether it encourages actions to elect or defeat" a candidate when taken as a whole
8 with limited reference to external events, such as the proximity to the election. 11 C.F.R.
9 § 100.22(b). In its discussion of then-newly promulgated section 100.22, the
10 Commission stated that "communications discussing or commenting on a candidate's
11 character, qualifications or accomplishments are considered express advocacy under new
12 section 100.22(b) if, in context, they have no other reasonable meaning than to encourage
13 actions to elect or defeat the candidate in question."

14 The only identifiable communication in this matter is CFT's "Baron the Dodger"
15 radio ad, which appears to have been broadcast in October 2004. No other CFT
16 communications from 2004 or 2006 were identified in the complaint or found on CFT's
17 website. The costs of the ad are unknown but CFT states that it spent "less than \$10,000"
18 on its radio ads in 2004. Regardless of whether the "Baron the Dodger" ad expressly
19 advocated the defeat of Rep. Hill, given the time that has elapsed since the alleged ad was
20 broadcast and the modest potential amount that Citizens for Truth spent on this ad, we
21 recommend that the Commission dismiss the allegations that Citizens for Truth failed to
22 report payments for the ad as independent expenditures in violation of 2 U.S.C. 434(c) as
23 a matter of prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

2. *Electioneering Communications*

As noted above, the complaint did not include any descriptions of CFT communications and the "Baron the Dodger" radio ad, which appears to have been broadcast in October 2004, is the only CFT communication we have identified from the CFT website. This radio ad is a broadcast communication that refers to a clearly identified candidate for federal office and was publicly distributed in October 2004, that is, within 60 days before a general election for the office sought by the candidate. See 2 U.S.C. § 434(f)(3). However, it is unclear whether it was "targeted to the relevant electorate," that is, whether it could have been received by 50,000 people in the relevant Congressional district. See 2 U.S.C. § 434(f)(3)(C). Moreover, CFT asserts that it spent less than \$10,000 radio ads in 2004. See CFT Response at 2. Because there is no information suggesting that CFT spent more than \$10,000 on electioneering communications in 2004, we recommend that the Commission find no reason to believe that Citizens for Truth failed to file an electioneering communications report in violation of 2 U.S.C. § 434(f).

IV. RECOMMENDATIONS

1. Find no reason to believe that Citizens for Truth made excessive in-kind contributions in violation of 2 U.S.C. § 441a or failed to report contributions in violation of 2 U.S.C. § 434 based on allegedly coordinated communications.
2. Find no reason to believe that Mike Sodrel, or the Friends of Mike Sodrel and Gregory M. Fitzloff, in his official capacity as treasurer, accepted excessive in-kind contributions in violation of 2 U.S.C. § 441a or failed to report contributions in violation of 2 U.S.C. § 434 based on allegedly coordinated communications.
3. Find no reason to believe that the Economic Freedom Fund violated 2 U.S.C. § 441a by making excessive contributions based on allegedly coordinated communications.

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4. Find no reason to believe that Citizens for Truth violated 2 U.S.C. § 433 by failing to register with the Commission.
5. Dismiss the allegation that Citizens for Truth violated 2 U.S.C. 434(c) by failing to file independent expenditure reports with the Commission.
6. Find no reason to believe that Citizens for Truth violated 2 U.S.C. § 434(f) by failing to file electioneering communication reports with the Commission.
7. Approve the appropriate letters.
8. Close the file.

Thomasenia P. Duncan
General Counsel

9/1/09
Date

BY: Ann Marie Terzaken
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